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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

FEBRUARY TERM, 1980

CAUSE NO. 27,399

GARY LYLES,
Petitioner

v.

STATE OF TEXAS and MARK WHITE,
as Attorney General of the State of Texas,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

DOHERTY, VELA, POSER, SEARS
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NOW COMES Petitioner, GARY LYLES, and respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the Texas Court of Criminal Appeals entered on October 3, 1979, rehearing denied on November 8, 1979, and for cause would show the Court the following:

OPINION

The opinion of the Texas Court of Criminal Appeals is attached hereto as Appendix A. The Motion for Re-

hearing was denied without written order on November 8, 1979.

JURISDICTION

This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1257(3). The petition for certiorari was filed less than ninety (90) days from the date that the Motion for Rehearing was denied and the mandate of the Texas Court of Criminal Appeals was issued.

STATEMENT OF FACTS

In cause number 27,399 a scire facia proceeding was brought by the Harris County District Attorney's Office in regard to a bond forfeiture in cause number 279,877, styled *The State of Texas v. Bill Earl Collins* as principal and Gary A. Lyles as surety. The record of the proceedings attached hereto as Appendix B, indicates that on May 12, 1978, the principal, Bill Earl Collins, was arrested by the Houston Police Department and charged with the possession of a controlled substance in cause number 279,877. Bond was set at $7,500.00. Petitioner-surety, Gary Lyles, made such bond for Bill Earl Collins, not knowing his true name to be Johnny David Johnson, who had twice before been convicted of a felony. The Houston Police Department took at face value that his name was Bill Earl Collins and did not check to see if that was his true name. There was no criminal record to be found when the $7,500.00 bond was set on May 30, 1978. Defendant Collins failed to appear at his arraignment and the bond was forfeited. A judgment of forfeiture was entered on May 31, 1978. Somedays later a Bill Earl Collins was arrested in Dallas and his fingerprints were checked against those taken from Bill Earl

Collins in Harris County, Texas. The fingerprints did not match. It was then found that the Bill Earl Collins who was arrested in Houston, Harris County, Texas, in cause number 279,877, was really Johnny David Johnson. The surety bonding company was able to locate the principal, Johnny David Johnson, in Phoenix, Arizona. However, before he could be taken into custody and returned to Texas, Johnny David Johnson died on July 18, 1978. Pursuant to the stipulation by the State, the trial court remitted $5,000.00 of the $7,500.00 bond and entered judgment in favor of the State of Texas against the surety, Gary A. Lyles, for $2,500.00. The State agreed to all of the foregoing facts. Notice of appeal was timely given and upon review, the Texas Court of Criminal Appeals affirmed the trial court's judgment, forfeiting the bond. However, it reformed the trial court's judgment to order forfeiture of the entire $7,500.00 bond. Motion for Rehearing was filed. The Motion for Rehearing was denied on November 8, 1979.

STATUTORY PROVISIONS INVOLVED

Art. 22.13 Causes Which Will Exonerate

The following causes, and no other, will exonerate the defendant and his sureties, if any, from liability upon the forfeiture taken:

2. The death of the principal before the forfeiture was taken.

Art. 22.16 The Court May Remit

If, before final judgment is entered against the bail, the principal appears or is arrested and lodged in jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond.

Art. 22.17 Forfeiture Set Aside

When the principal appears before the entry of final judgment, and sufficient cause is shown for his failure to appear before the forfeiture is taken, and a trial is had of the criminal action pending against him, he shall be entitled to have the forfeiture set aside.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Due Process Clause

No state shall make or enforce any law which . . . shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the law.

QUESTIONS PRESENTED

Whether the statutory procedure for bond forfeiture in Texas acts to deny bond sureties due process when the bond principal dies after the forfeiture and prior to judgment of forfeiture is entered.

REASONS FOR GRANTING THE WRIT

Petitioner alleges that the Texas procedure regarding bond forfeitures act to deny sureties due process and equal protection of the law in that the statutory scheme provides relief to sureties if the bond principal dies prior to the date the bond forfeiture becomes final. The Texas procedure also provides for remittitur of all or part of the bond if the principal is taken into custody in the proper county at any time. However, no provision is made for the remittitur of all or part of the bond based upon the death of the principal between the date of forfeiture and the date of the final judgment.

In the case at bar, the trial court granted the discretionary relief to remit part of the bond based upon the principal's death prior to the principal's arrest on the bond forfeiture capias. The State stipulated to the facts that he had been located in Phoenix, Arizona, and that prior to his arrest he did, in fact, die. V.A.C.C.P. Art. 22.16. Further, the State procedure allows for the forfeiture to be set aside if the principal appears before the entry of final judgment. And, for good cause shown, the forfeiture may be set aside. V.A.C.C.P. Art. 22.17.

Numerous courts have interpreted the Federal Rules of Criminal Procedure Rule 46 to imply that the principal's death will exonerate a surety if it appears that *justice* did not require the enforcement thereof. *U.S. v. Kehrt,* 128 F.Sup. 38, 15 Alaska 406, 1955. See also *Reese v. U.S.,* 9 Wall. 13, 19 L.Ed. 541; *Taylor v. Taintor,* 16 Wall. 366, 21 L.Ed. 287. Consequently, Petitioner, contends that his due process rights were violated when the Court of Criminal Appeals reformed the forfeiture judgment for the full bond amount. It should be noted that the grounds for appeal were that there was a variance between the bond and the final judgment and that the forfeiture should be set aside because the principal upon his arrest used an alias and not his true name. These issues were overruled by the trial court and by the appellate court. Appellant maintains that this action denied him due process pursuant to the Fourteenth Amendment because of the statutory scheme in Texas which prohibits remittitur in instances where the bond principal died prior to the forfeiture judgment becoming final.

CONCLUSION

For the foregoing reasons, this Petition for writ of certiorari should be granted.

Respectfully submitted,

DOHERTY, VELA, POSER, SEARS & COLLINS

By: Stanley G. Schneider

STANLEY G. SCHNEIDER
2225 LaBranch
Houston, Texas 77002
713/652-5711

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of February, 1980, a true and correct copy of the foregoing Petition for Writ of Certiorari was delivered to Mr. Johnny Holmes, at 201 Fannin, Houston, Texas, via U.S. Mail, Return Receipt Requested.

Stanley G. Schneider

STANLEY G. SCHNEIDER

APPENDIX A

NO. 61,699

GARY A. LYLES, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from HARRIS County

OPINION

This is an appeal from a bond forfeiture proceeding.

In two grounds of error appellant contends that the forfeiture should be set aside because the name given by the principal upon his arrest, and appearing on the bond, was an alias and not his true name. As a result, argues appellant, he, as surety, was not able to ascertain the principal's prior record of two felony convictions.

It is established that the only grounds for exonerating liability are those provided in Art. 22.13, V.A.C.C.P. The only provision thereunder that arguably could apply is that the false name rendered the bond "not a valid and binding undertaking in law." No cases are cited that would support such an interpretation of the statute. In Jones v. State, 504 S.W.2d 442, it was pointed out that a defendant's name may be alleged in an indictment by means of any name by which he is known, and may be corrected by motion of the defendant if he so desires. See the authorities cited and discussed in *Jones*. Just as the defendant's name in the indictment is for purposes of identification, so is the principal's name in the bond for purposes of establishing his identification. There was

no showing in this case that appellant (surety) mistook the principal to be some other person and thereby thought himself to be entering into the contract with some other individual. We hold that the mere use of an alias does not render the bond "not a valid and binding undertaking in law" within the terms of Art. 22.13(1), supra.

In his remaining ground of error appellant argues that there was a fatal variance between the bond and the final judgment of forfeiture in that the bond identified the charged offense by name and as a felony, while the judgment referred to the charge simply as a felony. International Fidelity Ins. Co. v. State, 489 S.W.2d 914, is contrary to appellant's position. The ground of error is overruled.

The State in its brief points out that the trial court ordered a remittitur on the bond, and suggests that this Court reform the final judgment to order forfeiture of the entire amount of the bond because the trial court was without lawful authority to order the remittitur. State ex rel. Vance v. Routt, 571 S.W.2d 903, held that a remittitur is authorized only under the terms of Art. 22.16, V.A.C.C.P. No authority for a remittitur appears in this case. The judgment is reformed to order forfeiture of the entire $7,500.00 amount of the bond.

As reformed, the judgment is affirmed.

ODOM, Judge

(Delivered October 3, 1979)

By: Panel 1, 3rd Quarter, 1979, composed of

John F. Onion, Jr., Presiding Judge
Wendell A. Odom, Judge
Carl E. F. Dally, Judge

APPENDIX B

CAUSE NO. 27399

BILL EARL COLLINS
GARY A. LYLES,
Appellants

v.

STATE OF TEXAS,
Appellee

APPEARANCES

FOR APPELLANTS:

MR. KEN J. McLEAN
Attorney at Law
Houston, Texas

FOR APPELLEE:

MR. JOHN HOLLIMAN
Assistant District Attorney
Harris County, Texas

BE IT REMEMBERED, that on the 8th day of March, 1979, came on to be heard before the Honorable Dan Walton, Judge of the 178th District Court of Harris County, Texas, Scire Facias No. 27399, Criminal Cause No. 279,877, State of Texas Vs. Bill Earl Collins, Principal and Gary A. Lyles, Surety, whereupon the following proceedings were had and testimony adduced, viz:

THE COURT: Scire Facis No. 27399, Criminal Cause No. 279,877, State of Texas Vs. Bill Earl Collins, Principal and Gary A. Lyles and Glenda Doby, Sureties.

MR. HOLLIMAN: I will stipulate to the facts regarding Bill Earl Collins.

THE COURT: Is that in your answer?

Mr. McLEAN: It is a stipulation.

THE COURT: What do you want me to do with this?

MR. HOLLIMAN: Mr. McLean wants to request remittitur of a certain amount of money based on circumstances surrounding the case. I would agree to stipulate with him certain facts that he feels are important. I didn't say that remittitur should be granted.

THE COURT: There is no exhibit attached.

MR. McLEAN: I thought there was. I've got it with me at this time. I would like to briefly state to the Court certain things so that the Court can understand what our position is.

That on May 12, 1978, the Defendant-Principal, Bill Earl Collins, was arrested by the Houston Police Department and charged with possession of a controlled substance. Bond was set at $7500. The Defendant-Surety made such bond for Bill Earl Collins not knowing his true name to be Johnny David Johnson who had twice before been convicted of a felony. The Houston Police Department took at face value his name to be Bill Earl Collins and did not check to see if that was his true name. There was no criminal record to be found when the $7500 bond was set. On May 30th, 1978 the Defendant failed to appear at his arraignment and bond was forfeited. A Judgment of forfeiture was entered May 31, 1978. Some days later a Bill Earl Collins was arrested in Dallas and his fingerprints were checked against those taken from

Bill Earl Collins on the charge in Harris County and were found not to match.

THE COURT: I'm not sure I understand what you're talking about regarding these fingerprints.

MR. McLEAN: When Bill Earl Collins was arrested in Dallas, his prints were checked against those taken from Bill Earl Collins in Harris County, and it was found that the prints did not match. It was found that the Bill Earl Collins who was arrested in Houston and had that $7500 bond out of the 178th District Court, that his true name was Johnny David Johnson and that he had in fact twice before been convicted of a felony. The Defendant subsequently died of an overdose on July 18, 1978 in Phoenix, Arizona.

MR. HOLLIMAN: I agreed to stipulate after the fingerprints on the document from Arizona came up and checked with the fingerprints on the bail bond.

THE COURT: Have you had a chance to check this out yourself?

MR. HOLLIMAN: Mr. McLean and I discussed this and they are on file out there.

THE COURT: I think we ought to get a fingerprint expert in here to be absolutely positive of what you're talking about.

(Fingerprint expert is called into the courtroom at this time.)

THE COURT: I will remit $5,000. Let the record reflect at this time that the Court makes a remittitur of $5,000 in Cause No. 27399, State of Texas vs. Bill Earl

Collins, Principal, Gary A. Lyles and Glenda Doby Sureties.

MR. HOLLIMAN: State has a motion to move to dismiss against Surety Glenda Doby.

THE COURT: State's motion is granted.

MR. HOLLIMAN: State would offer State's Exhibits No. 1, 2 and 3. We would tender the same to counsel for his inspection.

MR. McLEAN: No objection.

THE COURT: Admitted.

MR. HOLLIMAN: The State would rest.

MR. McLEAN: May it please the Court, I don't think we ever got our stipulation into evidence. I would challenge as to the State's case in that Judgment of Forfeiture does not show the same offense as the bail bond. The Judgment of Forfeiture shows for a felony and the bail bond shows that he was charged with possession of a controlled substance. There is a fatal variance. Also there is no evidence to show that the Defendant was ever called to the courtroom door.

THE COURT: Objection overruled. Mr. McLean, the Court finds that the State is entitled to a final judgment against the Principal Surety Gary Lyles in the amount of $2500.

MR. McLEAN: If I may, I would like to make sure our stipulation is in the record as to the different names of the Defendant. I believe it's in the motion but I don't think the motion is a part of the record. I would stipulate that the person arrested used the name Bill Earl Collins

which was not his true name but an alias, and that he had a criminal record.

MR. HOLLIMAN: The State will stipulate to that.

THE COURT: So reflected.

MR. McLEAN: I would like to read it into the record. The following stipulation is between John Holliman, Assistant District Attorney of Harris County, prosecuting this case in the 178th District Court, and Ken J. McLean, attorney for the Surety Gary A. Lyles in the matter of the State of Texas vs. Bill Earl Collins.

May it be agreed and stipulated that on May 12, 1978, the Defendant-Principal, Bill Earl Collins, was arrested by the Houston Police Department and charged with possession of a controlled substance, a felony, cause no. 279877, in the 178th District Court of Harris County, Texas. Bond was set at $7500.00. And upon the above date the Defendant-Surety made such bond and the Defendant-Principal was released. On May 30, 1978, the Defendant-Principal failed to appear at his arraignment and bond was forfeited. On July 18, 1978, Bill Earl Collins, Johnny David Johnson, was found deceased in Arizona. May it be agreed and stipulated between counsel for the State and Counsel for the Defendant-Surety, that Johnny David Johnson was one and the same person as Bill Earl Collins, Defendant-Principal in the above styled and numbered cause, and that the Defendant-Principal had prior convictions in the State of Texas for possession of dangerous drugs and burglary.

THE COURT: Does that conclude your stipulation?

MR. McLEAN: It does, Your Honor.

MR. HOLLIMAN: The State would agree to that.

THE COURT: Let the record show that on the evidence preesnted that the State is granted judgment against the Principal Bill Earl Collins and the Surety Gary A. Lyles in the amount of $2500. If you present an appropriate judgment, the Court will approve the same.

STATE OF TEXAS

COUNTY OF HARRIS

I, Marilyn Skinner, Official Court Reporter of the 228th District Court of Harris County, Texas, do hereby certify that I attended the hearing held on March 8, 1979 in the 178th District Court of Harris County, Texas, in regard to the previously mentioned numbered and styled cause. I record said hearing in machine shorthand which was later transcribed to typewriting. I further certify that the foregoing pages contain a true and correct transcript of the proceedings had to the best of my knowledge and belief.

/s/ MARILYN SKINNER
Marilyn Skinner, Official Court
Reporter, 228th District Court
Harris County, Texas